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CITATIONS

Cases:

Dodd v. *Commissioner*, 131 F. 2d 382 — 7

Woodruff v. *Commissioner*, 131 F. 2d 429 — 7

Statute:

Revenue Act of 1936, c. 690, 49 Stat. 1648:

Sec. 115 — 2, 7

Sec. 117 — 3, 7

547972 —48

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 205

THE CITIZENS & SOUTHERN NATIONAL BANK, CO-TRUSTEE OF THE ESTATE OF ENAMEL ULMAN, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 14–29) is reported at 46 B. T. A. 517. The opinion of the Circuit Court of Appeals (R. 44–47) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 15, 1943 (R. 47–48). Petition

for a writ of certiorari was filed July 28, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer held stock of a holding company which it had the right to exchange for stock of the subsidiary. In order to facilitate disposition of its shares for cash, the taxpayer exchanged the stock and then sold the subsidiary's shares. The question is whether the exchange is taxable as a partial liquidation under Section 115 (c) and (i) of the Revenue Act of 1936.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * * *

(c) *Distributions in Liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stocks, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. Despite the provisions of section 117 (a), 100 per centum of the gain so

recognized shall be taken into account in computing net income, * * *

* * * * *

(i) *Definition of Partial Liquidation.*—As used in this section the term "amounts distributed in partial liquidation" means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock.

* * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

* * * * *

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

* * * * *

STATEMENT

The taxpayer is trustee of the estate of Emanuel Ulman (R. 17).[1] At the time of decedent's death in 1929 his assets included 100 shares of the common stock of the Coca-Cola International

[1] Originally, there were two individual trustees in addition to the taxpayer corporate trustee. The former were discharged in April 1938. For convenience we shall refer to the taxpayer as the only trustee.

Corporation (hereafter referred to as International). International was a holding company organized in 1922 by holders of a majority of the common stock of The Coca-Cola Company (hereafter referred to as Coca-Cola). In 1926 International passed an irrevocable resolution providing that its stockholders might at any time surrender the capital stock of International to it and receive in exchange shares of Coca-Cola stock of an equivalent value, and that the International stock so surrendered should be retired and cancelled. Originally, one share of International stock was equivalent to one share of Coca-Cola stock, but successive stock dividends by Coca-Cola while the stock of International remained constant caused one share of International to be the equivalent of eight shares of Coca-Cola. (R. 18, 22, 24.)

The decedent's 100 shares of International had an agreed value of $29,375 at the date of his death. No stocks held by Ulman at his death were considered legal investments by trustees under the Georgia laws. In 1936, the trustee decided to sell all of the stock and bonds held in the estate, with a view to reinvestment in legal investments under Georgia laws. E. C. Scott, its trust officer, was directed to proceed with the sale. The trustee considered that it might be held personally liable if it continued to hold the assets of the estate in nonlegal investments and a loss

should result, and the consent of all the beneficiaries to its continuing to hold these investments could not be obtained. (R. 18–19.)

On or about September 5, 1936, Scott placed an order with the Macon branch of the brokerage firm of Fenner & Beane to sell the 100 shares of International common stock. The branch manager of that firm, J. T. Hogan, transmitted by wire the order to sell to their New York office. The New York office wired Hogan suggesting that the sale would be facilitated if the International common were first exchanged for 800 shares of Coca-Cola common. Hogan conveyed this suggestion to Scott, pointing out that it would be difficult to find buyers for International common, as each share had a value of over $900, whereas there was an active market for Coca-Cola common. No sales of International have been made on the New York Stock Exchange since November, 1934. (R. 19, 21.)

Scott then instructed Hogan to exchange 100 shares of International common for 800 shares of Coca-Cola common and to sell the 800 shares of Coca-Cola common at a fixed price. In accordance with these instructions the certificate for the 100 shares of International common was delivered to Fenner & Beane on September 8, 1936 (R. 20).

Thereafter, Fenner & Beane exchanged with International the certificate for 100 shares of International for eight certificates of 100 shares each of Coca-Cola common, and charged taxpayer with

the transfer tax and exchange fee, amounting to $65. The 100 shares of International stock were permanently retired. The new certificates were issued in the name of Fenner & Beane and were never actually delivered to taxpayer. However, Fenner & Beane never buy or sell stocks for their own account. (R. 20, 24.) Typed on the back of the certificate for 100 shares of International was a certification as follows (R. 20):

> We hereby certify that we have no ownership, or interest ---------- in ---------- shares of the stock above transferred. The transfer by the owner to us being merely for the purpose of sale.
>
> FENNER & BEANE,
> 67 Broad St., N. Y. C.

On September 29, 1936, Fenner & Beane made three sales for taxpayer's account of 100 shares each of the Coca-Cola common at 121½, and on October 5, 1936, they made two sales of 200 each and one sale of 100 shares, all at 121½. The net proceeds of the sales, amounting to $96,926.02 were duly remitted to taxpayer. None of the sales was made to Coca-Cola. (R. 20.)

The Commissioner determined that the exchange of the International shares for Coca-Cola common constituted a partial liquidation of International resulting in a gain to the taxpayer which was taxable in full under Section 115 (c) and (i) of the Revenue Act of 1936 (R. 16). The Board of Tax

Appeals sustained the Commissioner (R. 28–29), and the court below affirmed (R. 47–48).

ARGUMENT

It is not denied that the taxpayer's exchange of International stock for Coca-Cola shares, standing alone, constitutes a partial liquidation within the definition of Section 115 (i) of the Revenue Act of 1936, *supra,* and that consequently the gain realized upon this transaction would be fully taxable under Section 115 (c). The issue is whether the exchange should be disregarded for tax purposes and the transaction considered solely as a direct sale of the International shares subject to the capital gain limitations of Section 117 (a).

The decision of the court below is in accord with its two prior decisions concerned with the tax consequences of similar transactions by holders of International stock (*Dodd* v. *Commissioner,* 131 F. 2d 382; *Woodruff* v. *Commissioner,* 131 F. 2d 429), and no other cases have been decided which involve this issue. The taxpayer here had its choice of two ways by which it could dispose of its International stock for cash. One was to sell the International stock itself. The other was to exchange this stock for shares of Coca-Cola and sell the Coca-Cola. It chose the latter for the practical, business reason that the Coca-Cola shares were more marketable. The exchange, therefore, plainly had substance as a separate transaction,

and in the circumstances it could not properly be disregarded for tax purposes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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